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No. 78-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

OREGON STATE PENITENTIARY, CORRECTIONS DIVISION,
DEPARTMENT OF HUMAN RESOURCES;
PUBLIC EMPLOYE RELATIONS BOARD,
Petitioners,

v.

JERRY HAMMER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

---

BRIEF FOR RESPONDENT IN OPPOSITION

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JURISDICTION

We agree that the Petition for Certiorari was timely filed, so that this Court's jurisdiction over the Petition is properly invoked under 28 U.S.C. § 1257(3). However, while petitioners show, pursuant to Rule 23(1)(f) of this Court, that the first question presented by the Petition involves a federal question which was properly raised below, no such showing is made with respect to the second question presented, relating to remedy. As we develop at pp. 10-13, *infra*, this Court lacks jurisdiction to review the ruling challenged by the second question because the Oregon Supreme Court's choice of remedy rested independently and adequately (and perhaps even exclusively) on State law.

QUESTIONS PRESENTED

1. Did the court below properly apply the constitutional standards declared by this Court in evaluating the procedures by which respondent's employment was terminated?

2(a). Does the State Court's determination that respondent is entitled to back pay until he is properly terminated rest on an independent and adequate State ground?

(b). If not, was that determination erroneous as a matter of federal law?

STATEMENT

1. Respondent accepts the State's statement of the facts underlying respondent Hammer's discharge as quoted from the opinion of the Supreme Court of Oregon (Pet. 7-8).[1]

2. It is necessary, however, to dispel what the State refers to as "confusion as to the scope of review exercised by PERB [Public Employe Relations Board] in reversing Mr. Hammer's dismissal". (Pet. 6, n.2). At the time that it decided Hammer's case, the PERB did not make a *de novo* determination of the propriety of an employee's discharge. Rather, the proceeding before the Board was treated as an appeal from the employer's decision, the employee being denominated "Appellant".

The rule was stated as follows by the Oregon Court of Appeals:

> In order to modify or reverse an agency order dismissing or suspending an employe, the Board must—in those cases where 'good faith' is not an issue—find that the action is arbitrary either because the employer has failed to establish facts to support the charges upon which the action is based or because though the charges are supported they constitute no 'cause' upon which a reasonable employer would base the action taken.[2]

[1] Petitioners will sometimes be referred to collectively herein as the "State"; "Pet." refers to the Petition for a Writ of Certiorari.

[2] *Thompson* v. *Secretary of State*, 19 Or.App. 74, 80, 526 P.2d 621, 624, Ore. Sup. Ct. review denied (1974), followed in *Tupper* v. *Fairview Hospital*, 22 Ore. App. 523, 540 P.2d 401, 407, modified on other issues, 276 Ore. 657, 556 P.2d 1240.

This limited scope of review of the employer's decision underlies the PERB's approval of respondent's discharge although it determined after the hearing that less than half of the hours of unpaid sick leave on which the employer based the discharge were properly the subject of disciplinary action.[3] It is also significant in assessing the surmise that the infirmity in the pre-termination procedure could not have affected the proceedings against Hammer (Pet. 14-15). The *Thompson* rule was reaffirmed on this point by the Court of Appeals in the *Stanton* case referred to at Pet. 6, n.2,[4] and was approved by the Oregon Supreme Court in *Civil Rights Division of Bureau of Labor* v. *Williams*, 280 Ore. 595, 573 P.2d 270 (1977).[5]

[3] The Board determined that of the 1973 unpaid sick leave on which the charge relied, almost half was due to an industrial accident and therefore "not cognizable in any disciplinary action," and a large portion of the 1974 unpaid sick leave had actually been authorized by the employer. Findings 1 and 2, p. 2 of Public Employe Relations Board for the State of Oregon, No. 309, Rulings on Motions and Evidentiary Matters, Findings of Fact, Conclusions of Law, and Order (hereafter "PERB Decision"). The Board also made the following "Finding of Ultimate Fact" with respect to Hammer's absence:

> "Appellant in 1973 and 1974, in addition to exhausting normal sick leave (12 days a year) and vacation credit (10 days and 11 days respectively) was absent on an unauthorized leave without pay basis a total of 143¾ hours in 1973, and 169 hours in 1974. Sixteen days, or 128 hours, was taken in 1973, resulting from an industrial accident, in addition to the 143¾ hours leave without pay taken. In 1974 Appellant was given permission to take 10 days on a leave without pay basis, in addition to the 160 hours taken on an unauthorized leave without pay basis." (*Id.*, p. 3.)

The 143¾ hours in 1973 and 169 hours in 1974 on which the Board based its decision contrasts with 305 hours in 1973 and 335 hours in 1974 on which the employer based its action, see Pet. 61.

The PERB concluded: "This action is found to have been taken in good faith and for cause. A reasonable employer, with posts that must be filled, would not be expected to retain an employee who consistently had this much absence from work" (PERB Decision, p. 4).

[4] *Stanton* overruled *Thompson* on an entirely distinct issue, not involved here, namely, the scope of the PERB's fact-finding authority.

[5] The Supreme Court of Oregon said in *Williams*, 573 P.2d at 271-272) (emphasis supplied):

3. Finally, it is necessary to describe somewhat more fully the Supreme Court of Oregon's reasoning in *Tupper* v. *Fairview Hospital*, 276 Ore. 657, 556 P.2d 1340 (1976), (reproduced as Appendix H to the Petition, pp. 42-55). *Tupper* was decided together with, and followed in, the Supreme Court of Oregon's initial decision of this case (*Hammer I*, Pet. 35-38), which was reaffirmed in the decision of which review is now sought (*Hammer II*, Pet. 23-30). While the Supreme Court was unanimous in deciding that the pre-termination procedures were unconstitutional, one Justice concluded, without reaching the Fourteenth Amendment issue, that the pre-termination procedures violated Art. I, § 10 of the Oregon constitution. See Pet. 50-55 (*Tupper*), followed at Pet. 30 (*Hammer I*). In response, the majority explained in *Tupper* that it determined initially that the procedures were unlawful under the Fourteenth Amendment, and only derivatively, because the due process requirements of both provisions were "essentially the same," that Art. I, § 10 was also violated. (Pet. 48, n.2).[6] With respect to remedy, the court wrote in *Tupper* (Pet. 49):

> Since none of these safeguards were provided, we find that the procedures employed did not comply with the due process clause of the fourteenth amendment and that Tupper's dismissal on August 2, 1974,

The Court of Appeals has, in a number of cases, construed these statutes to provide that where there is cause for discipline ERB *may only modify* disciplinary action taken by the agency *if it*, ERB, *finds that no reasonable employer would have regarded the facts as presenting sufficient cause for the disciplinary action taken.* (Citing *inter alia, Stanton and Thompson.*)

[6] The court reasoned (*id.*):

> The concurring opinion in this case apparently acknowledges that the due process clause of the federal constitution, as interpreted by the United States Supreme Court in *Arnett*, does not require a full-scale evidentiary hearing prior to the dismissal of a classified employee. However, that opinion then takes the position that the "due course of law" provision in Article 1, § 10, of the Oregon Constitution should be interpreted to require a full pretermination hearing in such cases. This issue was never raised, briefed or argued by the parties in this case. Moreover, as demonstrated by the cases cited in footnote four of the concurring opinion, the procedural effect of state "due course of law" constitutional provisions is essentially the same as the procedural effect of the due process clause of the fourteenth amendment to the federal constitution. Therefore, in the absence of some compelling public interest in giving Art. 1, § 10, of our constitution a broader interpretation in this situation than that given to the due process clause of the fourteenth amendment by the federal courts, we decline to adopt such a construction. [Citing a series of Oregon decisions.]

> was invalid. Because his dismissal was invalid, we conclude that Tupper is entitled to an award of back wages and other benefits and that he should continue to receive these amounts until he has been properly terminated.[5] In determining these amounts, the Board should offset any compensation and other benefits Tupper has received since his original termination.

[5] The Court of Appeals seems to have concluded that PERB lacked the necessary authority to order an award of back wages upon a finding that the termination was procedurally invalid. Although there is apparently nothing in the authorizing statute which gives PERB the authority to issue such an order on its own, *see* ORS 240.560, the constitutional nature of the deprivation involved is enough to require this court to direct that such an award be made. Moreover, ORS 240.563 and 193.482 specifically authorize the reviewing court to reverse or remand the agency's order if it finds "[t]he statute, rule or order to be unconstitutional." ORS 183.482(8)(b).

Hammer I followed *Tupper* on this point without additional comment, see Pet. 38. *Hammer II* added nothing further on the remedial issue.

REASONS FOR DENYING THE WRIT

I. The Petition Accepts The State Court's Formulation Of The Governing Legal Standards; Its Disagreement With The Court's Application Of Those Standards Is Without General Importance And Lacks Merit.

A. In considering petitioner's claim of inconsistency between the decision below and the "reasoning of this

Court", (Pet. 10)[7] it is essential to bear in mind that the holding below is very narrow:

> We emphasize again that we do not hold that due process requires an evidentiary hearing prior to employment termination in cases such as this. We merely hold that Hammer was entitled to notice of the charges against him, the kind of sanctions being considered, and an opportunity to respond to the charges prior to his dismissal. In our view, such a requirement will impose a minimal burden on the state. (Pet. 29-30)

Thus, this case differs from each of those on which petitioner relies, wherein the issue was "the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter", *Dixon* v. *Love*, 431 U.S. 105, 112, quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 333. Indeed, the procedural rights required by the decision below are no greater than those which had actually been afforded in *Mathews*, 424 U.S. at 323-324, 337-338, and in the only employment case on which petitioner relies, see *Arnett* v. *Kennedy*, 416 U.S. 134, 137, 140-144 (opinion of Rehnquist, J.), 170 (opinion of Powell, J.). In *Dixon*, the facts which *automatically* called for deprivation of the property right (suspension of a driver's license) had already been established at full evidentiary hearings, see 431 U.S. at 113; and in *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, the decision to dismiss a student for *academic* grounds was deemed "not readily adapted to the procedural tools of judicial or administrative decision-making", (*id.* at 90), contrasting *disciplinary* determinations for which *Goss* v. *Lopez*, 419 U.S. 565, requires a hearing far more elaborate than that contemplated by the decision below.

[7] We note that the State does not contend that the decision below is contrary to anything which has actually been *decided* by this Court.

B. The State does not deny that respondent, who was subject to dismissal only "for cause" enjoyed a constitutionally protected "property" interest in his continued employment. See Pet. 4. Nor does the State contend that the court below applied the wrong legal standard. No such contention would be tenable, since the three-step analysis of *Mathews*, 424 U.S. at 335 (which was reaffirmed in *Dixon*, 431 U.S. at 112-113[8] and which the State recognizes is proper, see Pet. 11[9]) was followed in its *Tupper* opinion, see Pet. 46-47, and again on remand herein, see Pet. 26-29. The court thereby faithfully complied with the direction (434 U.S. 945) to reconsider its original decision herein in light of *Dixon*.

In short, the State's sole claim is that the Oregon Supreme Court erred in applying the agreed-upon legal standard to respondent's discharge. While this Court undoubtedly has jurisdiction to review a state court's application of federal standards, the occasions for the exercise of that authority must be rare indeed. This Court having delineated the controlling factors, the task of evaluating particular state employee discharge procedures according to those factors must perforce be left to the state courts and the lower federal courts. The State does not even assert that its claim that the Oregon Court erred in applying these criteria is especially significant or otherwise more worthy of review than a like claim which might be brought by the losing party—be it a public employer or a public employee—in any of the countless cases which will inevitably be generated by the seminal decisions in *Board of Regents* v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U.S. 593. In thus

[8] Accordingly, the issue which divided this Court in *Bishop* v. *Wood*, 426 U.S. 341, is not presented.

[9] See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 16-18, where the balancing approach of *Mathews* resulted in the conclusion that a public utility's administrative procedure for entertaining customer complaints concerning termination was constitutionally inadequate.

resting on its claim of error on this record, the State ignores the admonition that this Court's exercise of its certiorari jurisdiction, "is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review" (*Ross* v. *Moffitt*, 417 U.S. 600, 617). In any event, the claim is not well taken.

C. With respect to the private interest affected by the decision, the Court below said:

> On a continuum, placing a driver's license and other "privileges" at one end and welfare payments and other "necessities" at the other end, employment semes to us to be closer to the "necessity" end of the continuum. (Pet. 27)

This view is entirely sound, and consistent with *Arnett*, Pet. 11, where neither of the opinions for the majority suggested, and the Court plainly did not hold, that the employee's interest in continued employment is unworthy of even limited procedural protection. The State simply cites *Arnett*, although as noted, the Court there decided only that the employee was not entitled to a pretermination evidentiary hearing.

The State contends that the "risk of erroneous deprivation through the procedures used in this case is minimal" (Pet. 12). But it is plain from the decision of the Public Employe Relations Board that the propriety of the discharge involved much more than an interpretation of attendance records and that the risk of error was quite substantial.[10] The State's claim that its procedures are reliable is discredited by the PERB's ultimate finding that Hammer could lawfully be charged with less than half of the hours of unpaid sick leave on which the employer relied in discharging him. See text and note at p. 3, n.3, *supra*. And, as the court below said, contrasting *Dixon* v. *Love*:

[10] Seven witnesses appeared at the hearing and the transcript runs 296 pages.

> * * * the decision in the present case was not automatic. Instead, it was necessary to consider a variety of factors, including the reasons for Hammer's absenteeism, the Penitentiary's ability to accommodate his absences, and the possibility that the absenteeism might be eliminated in the future. Particularly with respect to the third factor, we believe that Hammer should have been afforded an informal opportunity to respond to the charges prior to his dismissal. (Pet. 28)[11]

Lastly, the State asserts that "the Oregon Supreme Court determined there was no 'substantial public interest' in Mr. Hammer's termination" (Pet. 13). But what the court below actually determined was (Pet. 29, emphasis supplied):

> Finally, there was no "substantial public interest" *in the summary termination of Hammer's employment* comparable to the public interest in highway safety that compelled the summary license revocation in *Dixon*. Hammer's performance as a corrections officer was not under attack, only his absenteeism. To allow him an informal opportunity to respond to the charges against him prior to his termination would have posed no substantial threat to prison security.

This reasoning, too, is entirely consistent with *Arnett*, (Pet. 13) which, as we have stressed, dealt with "a requirement of a prior evidentiary hearing" (416 U.S. at 168, opinion of Powell, J.).

[11] Petitioner presented evidence at the PERB hearing, and could have shown to his employer, that his injuries were in remission at the time of his discharge and thus not a valid basis for assuming he would be as absent in the future. (PERB Tr. 226, 240, 261-262). Particularly since those injuries were in part incurred in the Vietnam war, and in part in the course of his employment, the employer might have considered discharge to be too drastic a course. But the PERB was without authority to reverse his discharge unless it could find that a reasonable employer could not have imposed that sanction. See *Thompson*, p. 2 at n.2, *supra*, and *Williams*, pp. 3-4, n.5, *supra*.

In sum, there is no merit in the Petition's contention that the Supreme Court of Oregon erred in applying the standards laid down by this Court; more significantly, the contention lacks sufficient general importance to justify this Court's attention.

II. The Remedy Provided By The State Court Rests On An Independent And Adequate State Ground; The State's Objection To The Remedy Is Without General Importance And Lacks Merit.

A. The second question presented by the Petition is: "Under such circumstances [which the question partially misstates, see p. 13, *infra*], does the Fourteenth Amendment require that the employee be considered still employed and entitled to an award of back wages?" (Pet. 3-4). However, the Court below did not, in either of its *Hammer* opinions, nor in *Tupper*, state that the remedy which it provided was required by the Fourteenth Amendment; the Court's actual reasoning on this point, quoted at pp. 4-5, *supra*, says nothing about the federal Constitution. Nor does the State make any showing in the portion of the Petition entitled "Manner in Which Federal Question was Raised" (Pet. 8) or elsewhere, that the remedial issue was decided by the court below on federal grounds or otherwise involves a federal question which had been properly raised.[12] This omission, which contrasts with the State's properly comprehensive description of

[12] All that the Petition says is "The court found that because of the violation of the Fourteenth Amednment, Mr. Hammer was still employed and entitled to back wages until the time he was properly terminated." Pet. 14. This statement may usefully be contrasted with what the State asserted in its prior Petition for certiorari (No. 76-1377, at p. 13): "As a result of its finding of a violation of procedural due process, the Oregon Supreme Court held that the Fourteenth Amendment dictates that Mr. Hammer is still employed and entitled to an award of back wages for the entire time involved." Unlike its antecedent, the current version is accurate; but it is well short of the requisite assertion that the court below held that an award of back pay is required by the Fourteenth Amendment.

how the first question was raised,[13] is itself decisive if the purpose of Rule 23(1)(f) is to be respected. The State's obligation to establish jurisdiction is all the clearer since it was put on notice of our position that "the Oregon Supreme Court's decision on remedy rests on an independent and adequate State ground and is therefore not reviewable here". See Respondent's brief in opposition to certiorari (inadvertently untitled) in No. 76-1377, p. 8. We reiterate this submission here. See, *e.g.*, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 564; *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 491-492.

As already noted, there is no indication in the Supreme Court of Oregon's opinions in *Tupper* or *Hammer* that its selection of the remedy was based on the perceived compulsions of *federal* law.[14] On the contrary, in discussing this issue, the Court corrected, *on the basis of Oregon statutes*, the Oregon Court of Appeals' view that the Public Employe Relations Board lacked authority to award back wages. See Pet. 49, n.5, quoted at p. 5, *supra*. The Oregon statutes there referred to authorize the reviewing court to reverse or remand the agency's action if it finds the "statute, rule or order" to be "unconstitutional," without specifying that only violations of the federal constitution can be corrected; plainly, violations of the state constitution which are likewise of a higher legal order are also included. Moreover, prior Oregon decisions had provided for reinstatement with full back pay for violations of employee rights, be their source

[13] While the pre-termination procedures were found to violate both the federal and state constitutions (see p. 4, and n.6, *supra*), the majority opinion below makes clear that with respect to that issue the Oregon court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568.

[14] Given the Court's scrupulous care to articulate the basis of its holding on the termination issue (thereby obviating any jurisdictional obstacles to review thereof), the inference that it was making an independent judgment on the remedy issue is compelling.

contractual, statutory, or constitutional. *Papadopoulos* v. *Oregon State Bd. of Higher Ed.*, 14 Or.App. 130, 511 P.2d 854, 876, Ore. Sup.Ct. *review denied* (1973) *cert. denied*, 417 U.S. 919, citing *Greene* v. *Howard University*, 134 U.S.App.D.C. 81, 412 F.2d 1128 (breach-of-contract case).[15]

It follows that the state court's award of back pay rests entirely on an independent state ground. And that ground is *adequate*, unless it violates the federal Constitution for a state to provide a more generous remedy than the federal Constitution requires for a violation of an employee's Fourteenth Amendment rights. And, while we believe that any contention that the federal Constitution is violated by such unnecessary generosity would be insubstantial, the important point, for jurisdictional purposes, is that the State makes no such contention in the Petition for Certiorari and, despite two opportunities, did not assert before the Supreme Court of Oregon that the remedy which it directed violates the federal Constitution. For these reasons, it is clear that the remedial issue is not properly before this Court.

There is an additional jurisdictional infirmity in the State's effort to obtain review of the remedial issue. As we have seen, once the court below had decided that the procedures whereby respondent was discharged violated the Fourteenth Amendment, it also concluded, because "the procedural effect of state 'due course of law' constitutional provisions *is essentially the same* as the procedural effect of the due process clause of the fourteenth amendment," that Article I, § 10 of the Oregon statute is also violated (Pet. 48, n.2, emphasis added). *Thus, the State Court's order remedied a violation of both the state and federal constitutions.* And of course, the appropriate remedy for a violation of state-created rights does not raise any federal question. If it could be said that the State Court's decision was based on federal

[15] In *Greene* the court expressly disavowed deciding any constitutional issue. See 134 U.S.App.D.C. at 84, 412 F.2d at 1131.

grounds insofar as it remedied a violation of the Fourteenth Amendment, it certainly rested exclusively on State grounds insofar as it remedied the violation of the State constitution. For this reason too, this Court is without jurisdiction to review that portion of the State Court's decision to which the second Question Presented by the Petition is addressed.

B. Even if, contrary to the foregoing, this Court has jurisdiction to review the propriety of the remedy, certiorari should not be granted to consider that issue, for the Petition does not even suggest that this is an issue of general importance; it asserts only that the decision below was wrong, as if that were a sufficient reason for granting certiorari. And here again, the State's criticism of the decision below is wide of the mark.

The claim of error rests entirely on the proposition that "the Oregon court failed to find that the post-termination hearing cured any procedural errors which occurred in the pretermination procedure" (Pet. 15). The Supreme Court of Oregon was entirely justified in failing to so find because it is clear as a matter of law that the constitutional inadequacy of the pre-termination procedures was not "cured" by the PERB's decision after hearing: The PERB did *not*, as asserted in the State's description of the question presented, find "that the employer had sufficient reason under the law to dismiss the employe" (Pet. 3). Rather, in accord with its limited review function under Oregon law, see p. 2, *supra*, the PERB determined only that Hammer's absences constituted cause for which a reasonable employer would discharge an employee. See p. 3, *supra*.

An argument identical to that of the State was met and rejected under parallel circumstances in *Armstrong* v. *Manzo*, 380 U.S. 545. There, a Texas trial court, without notice to the natural father, had entered an adoption decree depriving him of his parental rights. The Texas Court of Civil Appeals held "that whatever constitutional

infirmity resulted from the failure to give the [father] notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree" (see *id.* at 551). This Court disagreed because in the subsequent hearing the father was faced with a more substantial burden than would have been imposed on him if the constitutionally mandated procedures had been followed from the beginning. Mr. Justice Stewart wrote for a unanimous Court (*id.* at 552):

> A fundamental requirement of due process is "the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.

See also *Goss* v. *Lopez*, 419 U.S. 565, 581-582, n.10.

In the present case, respondent never had the opportunity to point out to his employer, or to anyone else who possessed independent authority to determine whether he should be discharged, that a substantial part of the absenteeism with which he was charged could not properly be considered as a basis for dismissal, see p. 3, *supra*, and to urge, for instance, that since his performance at work had been entirely satisfactory, that he should be retained. Therefore, the PERB's decision *could not* "wipe[] the slate clean." The only adequate and equitable remedy for the violation is therefore to treat the entire proceedings against respondent as a nullity, and to hold that he is entitled to receive wages and other employee benefits unless and until he is discharged in accordance with the constitutionally mandated pre-termination procedures. That is the remedy provided by the court below. If the State's challenge to that remedy

is within this Court's jurisdiction, it is not of sufficient merit to warrant plenary consideration.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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